

TABLE OF CONTENTS
LOCAL RULES
FOR
ALTERNATIVE DISPUTE RESOLUTION

Page

1. PURPOSE AND SCOPE OF RULES	ADR 6
1-1. Title	ADR 6
1-2. Purpose and Scope	ADR 6
 2. GENERAL PROVISIONS	 ADR 7
2-1. ADR Unit	ADR 7
2-2. ADR Magistrate Judge	ADR 7
2-3. Referral to ADR Program	ADR 8
(a) At Filing	ADR 8
(b) By Stipulation, Motion or Order	ADR 8
(c) Relief from Automatic Referral	ADR 8
2-4. Violation of the ADR Local Rules	ADR 8
(a) Reporting Violation	ADR 8
(b) Sanctions for Violation	ADR 9
2-5. Neutrals	ADR 9
(a) Panel	ADR 9
(b) Qualifications and Training	ADR 9
(c) Oath	ADR 10
(d) Conflicts of Interest	ADR 10
(e) Immunities	ADR 10
2-6. Evaluation of ADR Programs	ADR 10
 3. ADR MULTI-OPTION PROGRAM	 ADR 11
3-1. Purpose	ADR 11
3-2. Summary Description	ADR 11
3-3. Assignment to ADR Multi-Option Program	ADR 11
3-4. ADR Options	ADR 12
(a) Court-Sponsored ADR Program	ADR 12
(b) Private ADR	ADR 12
3-5. Selecting an ADR Process	ADR 12
(a) Selection by Prompt Stipulation	ADR 12
(b) Selection Through ADR Telephone Conference	 ADR 13

(c) Selection at Case Management Conference	ADR 14
3-6. Timing of ADR Process	ADR 14

4. NON-BINDING ARBITRATION	ADR 15
4-1. Description	ADR 15
4-2. Automatic Referral to Arbitration	ADR 15
(a) Eligible Cases	ADR 15
(b) Determination of Monetary Claim	ADR 16
(c) Relief from Automatic Referral	ADR 16
4-3. Referral by Stipulation or Order of the Court	ADR 16
(a) By Order of the Assigned Judge	ADR 16
(b) By Stipulation	ADR 17
4-4. Arbitrators	ADR 17
(a) Selection	ADR 17
(b) Compensation	ADR 18
(c) Payment and Reimbursement	ADR 18
4-5. Timing and Scheduling the Hearing	ADR 18
(a) Hearing Date	ADR 18
(b) Postponement Due to Motion	ADR 19
(c) Place and Time	ADR 19
4-6. Discovery	ADR 19
4-7. <i>Ex Parte</i> Contact Prohibited	ADR 19
4-8. Written Arbitration Statements	ADR 19
(a) Time for Submission	ADR 19
(b) Prohibition against Filing	ADR 19
(c) Content of Statement	ADR 20
(d) Modification of Requirement by Arbitrator(s)	ADR 20
4-9. Optional Telephone Conference Before Arbitration	ADR 20
4-10. Attendance at Arbitration	ADR 20
(a) Attendance of Party and Counsel	ADR 20
(b) Counsel	ADR 21
(c) Request to be Excused	ADR 21
4-11. Authority of Arbitrators and Procedures at Arbitration	ADR 22
(a) Authority of Arbitrators	ADR 22
(b) Presumption against Bifurcation	ADR 22
(c) Quorum	ADR 22
(d) Testimony	ADR 22
(e) Transcript or Recording	ADR 22
(f) Default of Party	ADR 23
4-12. Award and Judgment	ADR 23
(a) Form of Award	ADR 23

(b) Filing and Serving the Award	ADR 23
(c) Sealing of Award	ADR 23
(d) Entry of Judgment on Award	ADR 23
4-13. Trial <i>De Novo</i>	ADR 24
(a) Time for Demand	ADR 24
(b) Limitation on Admission of Evidence	ADR 24
 4-14. Stipulation to Binding Arbitration	ADR 24
4-15. Federal Arbitration Act Presumptively Inapplicable	ADR 24

5. EARLY NEUTRAL EVALUATION	ADR 25
5-1. Description	ADR 25
5-2. Automatic Referral to ENE	ADR 25
(a) Eligible Cases	ADR 25
(b) Relief from Automatic Referral	ADR 26
5-3. Referral by Stipulation, Motion or Order	ADR 26
5-4. Evaluators	ADR 26
(a) Assignment	ADR 26
(b) Compensation	ADR 26
(c) Payment	ADR 26
5-5. Timing and Scheduling the ENE Session	ADR 27
(a) Scheduling by Evaluator	ADR 27
(b) Deadline for Conducting Session	ADR 27
5-6. Requests to Extend Deadline	ADR 27
(a) Motion Required	ADR 27
(b) Content of Motion	ADR 27
5-7. <i>Ex Parte</i> Contact Prohibited	ADR 28
5-8. Telephone Conference Before ENE Session	ADR 28
5-9. Written ENE Statements	ADR 28
(a) Time for Submission	ADR 28
(b) Prohibition Against Filing	ADR 28
(c) Content of Statement	ADR 28
5-10. Special Provisions for Patent, Copyright, or Trademark Cases	ADR 29
(a) Patent Cases	ADR 29
(b) Copyright Cases	ADR 29
(c) Trademark Cases	ADR 30
5-11. Attendance at Session	ADR 30
(a) Parties	ADR 30
(b) Counsel	ADR 31
(c) Request to be Excused	ADR 31
(d) Participation by Telephone	ADR 31
5-12. Procedure at ENE	ADR 31
(a) Components of ENE Session.	ADR 31

(b) Process Rules	ADR 32
(c) Evaluation and Settlement Discussions	ADR 32
5-13. Confidentiality	ADR 32
(a) Confidential Treatment	ADR 32
(b) Confidentiality Agreement	ADR 33
(c) Stipulation	ADR 33
5-14. Follow Up	ADR 33
(a) Discussion at Close of ENE	ADR 33
(b) Follow Up the Evaluator May Order	ADR 33
(c) Stipulation to Follow Up Session	ADR 33
(d) Limitations on Authority of Evaluator	ADR 33
5-15. Certification of Session	ADR 34
 6. MEDIATION	ADR 35
6-1. Description	ADR 35
6-2. Eligible Cases	ADR 35
6-3. Mediators	ADR 35
(a) Assignment	ADR 35
(b) Compensation	ADR 35
(c) Payment	ADR 36
6-4. Timing and Scheduling the Mediation	ADR 36
(a) Scheduling by Mediator	ADR 36
(b) Deadline for Conducting Mediation	ADR 36
6-5. Request To Extend the Deadline	ADR 36
(a) Motion Required	ADR 36
(b) Content of Motion	ADR 36
6-6. Telephone Conference Before Mediation	ADR 36
6-7. Written Mediation Statements	ADR 37
(a) Time for Submission	ADR 37
(b) Prohibition Against Filing	ADR 37
(c) Content of Statement	ADR 37
6-8. Contact with Mediator Before the Mediation	ADR 38
6-9. Attendance at Session	ADR 38
(a) Parties	ADR 38
(b) Counsel	ADR 38
(c) Request to be Excused	ADR 39
(d) Participation by Telephone	ADR 39
6-10. Procedure at Mediation	ADR 39
6-11. Confidentiality	ADR 40
(a) Confidential Treatment.	ADR 40
(b) Confidentiality Agreement	ADR 40
6-12. Follow Up	ADR 40
6-13. Certification of Session	ADR 40

7. SETTLEMENT CONFERENCES	ADR 41
7-1. Description	ADR 41
7-2. Referral to a Settlement Conference	ADR 41
7-3. Request of a Party	ADR 41
7-4. Directives from the Settlement Judge	ADR 41
7-5. Prohibition on Communication between the Settlement Judge and the Assigned Judge	ADR 42
8. OTHER ADR PROCESSES	ADR 43
8-1. Other Court ADR Processes	ADR 43
(a) Non-binding Summary Bench or Jury Trial	ADR 43
(b) Special Masters	ADR 43
8-2. Private ADR	ADR 43

**LOCAL RULES
FOR
ALTERNATIVE DISPUTE RESOLUTION**

1. PURPOSE AND SCOPE OF RULES

1-1. Title.

These are the Local Rules for Alternative Dispute Resolution in the United States District Court for the Northern District of California. They should be referred to as "ADR L.R. ____."

1-2. Purpose and Scope.

(a) **Purpose.** The court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The court also recognizes that sometimes an alternative dispute resolution procedure can improve the quality of justice by improving the parties' clarity of understanding of their case, their access to evidence, and their satisfaction with the process and result. The court adopts these ADR Local Rules to make available to litigants a broad range of court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial. The court offers diverse ADR services to enable parties to use the ADR process that promises to deliver the greatest benefits to their particular case.

(b) **Scope.** These ADR Local Rules supplement the civil local rules of the court and, except as otherwise indicated, apply to all civil actions filed in this court. Cases subject to these ADR local rules also remain subject to the other local rules of the court.

(c) **Magistrate Judges Consent Cases.** In cases in which the parties have consented to jurisdiction by a magistrate judge under 28 U.S.C. § 636(c), the magistrate judge shall have the full scope of powers that these ADR local rules confer on district judges, including the authority to refer cases to ADR programs and to grant relief from the requirements of these ADR local rules.

ADR Local Rules

2. GENERAL PROVISIONS

2-1. ADR Unit.

(a) Staff and Responsibilities. The ADR Unit shall consist of a Director of ADR Programs, ADR Program Counsel, ADR Administrator and such case administrators as the court may authorize. The ADR Director and ADR Program Counsel shall be attorneys with expertise in ADR procedures. The ADR Unit shall be responsible for the design, implementation, administration and evaluation of the court's ADR programs. It also shall be responsible for recruiting, screening and training attorneys to serve as neutrals in the court's ADR programs.

(b) Contacting the ADR Unit. The address and phone numbers of the ADR Unit are:

U.S. District Court-ADR Unit
450 Golden Gate Avenue, 16th Floor
San Francisco, CA 94102

Telephone: (415) 522-2199
Telephone for ADR Telephone Conferences only: (415) 522-4603
fax: (415) 522-2146

Commentary

The court encourages litigants and counsel to contact the ADR Unit to discuss the suitability of ADR options for their cases or for assistance in tailoring an ADR procedure to a specific case.

2-2. ADR Magistrate Judge.

The court has appointed United States Magistrate Judge Wayne D. Brazil as the ADR Magistrate Judge. The ADR Magistrate Judge will be responsible for supervising the ADR Unit, consulting with the ADR Director and ADR Program Counsel on issues of policy, assisting with the training of neutrals, ruling on requests to be excused from appearing in person at arbitration, ENE and mediation sessions, and hearing and determining complaints alleging

ADR Local Rules

violations of these ADR local rules.

2-3. Referral to ADR Program.

(a) **At Filing.** As set forth in ADR L.R. 4-2 and 5-2, some cases, identified by objective criteria, shall be referred to an ADR program automatically at the time of the filing of the complaint or the notice of removal. The initial case management schedule issued at filing shall state whether a case has been so referred.

(b) **By Stipulation, Motion or Order.** Subject to pertinent jurisdictional constraints, a case may be referred to an ADR program by order of the assigned judge following a stipulation by all parties, by motion of a party under Civil L.R. 7, or on the judge's initiative. A stipulation and proposed order selecting an ADR process shall designate the specific ADR process the parties have selected and set forth any other information the parties would like the court to know.

(c) **Relief from Automatic Referral.** Any party whose case has been referred automatically to an ADR program may file with the assigned judge a motion for relief from automatic referral under Civil L.R. 7. The criteria under which the judge will rule on such motions are specific to each program and are set forth below in ADR L.R. 3-5(c)(3), 4-2(c) and 5-2(b).

2-4. Violation of the ADR Local Rules.

(a) Reporting Violation.

(1) **Report by Neutral.** An arbitrator, evaluator, or mediator who perceives a material violation of these ADR local rules shall make a written report directly to the ADR Magistrate Judge and provide copies to all counsel. Such reports shall not be filed and shall not be presented to the assigned judge.

(2) **Report by Lawyer or Litigant.** A lawyer or litigant who wants to bring to the court's attention an alleged material violation of these ADR local rules must do so by letter sent directly to the ADR Magistrate Judge. Such a letter of complaint must be accompanied by a

ADR Local Rules

competent declaration, must be sent contemporaneously to all other parties and the neutral (if already identified), shall not be filed and shall not be presented to the assigned judge.

(b) Sanctions for Violation of these Local Rules. If, upon receiving a written allegation that a party or lawyer has violated one of these ADR local rules, the ADR Magistrate Judge determines that the matter warrants further proceedings, the ADR Magistrate Judge shall issue an order to show cause why sanctions should not be imposed. The ADR Magistrate Judge will afford all interested parties an opportunity to be heard before deciding whether to impose monetary sanctions or to recommend that the court impose other sanctions. Any objections to such sanctions shall be made by motion under Civil L.R. 7 before the General Duty Judge, unless the General Duty Judge is the assigned judge, in which case the objections shall be made to the Chief Judge.

2-5. Neutrals.

(a) Panel. The ADR Unit shall maintain a panel of neutrals serving in the court's ADR programs. Neutrals will be selected from time to time by the court from applications submitted by lawyers willing to serve. In a limited number of cases, the ADR Director and ADR Program Counsel may serve as neutrals.

(b) Qualifications and Training. Each lawyer serving as a neutral in a court ADR program shall be a member of the bar of this court or a member of the faculty of an accredited law school and shall successfully complete training as required by the court. Additional minimum requirements for serving on the court's panel of neutrals, which the court may modify in individual circumstances for good cause, are as follows:

(1) Arbitrators. Arbitrators shall have been admitted to the practice of law for at least 10 years and shall have:

(A) For not less than five years, committed 50% or more of their professional time to matters involving litigation; or

(B) Substantial experience serving as a neutral in dispute resolution proceedings.

(2) ENE Evaluators. Evaluators shall have been admitted to the practice of law for at least 15 years and have considerable experience with civil litigation in federal court. Evaluators shall also have substantial expertise in the subject matter of the cases assigned to them and shall have the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations.

(3) Mediators. Mediators shall have been admitted to the practice of law for at least 7 years and shall be knowledgeable about civil litigation in federal court. Mediators shall have strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

(c) Oath. Lawyers serving as neutrals in any of the court's ADR programs shall take the oath or affirmation prescribed in 28 U.S.C. § 453.

(d) Conflicts of Interest. No lawyer may serve as a neutral in a case in a court ADR program in violation of the standards set forth in 28 U.S.C. § 455. If a prospective neutral discovers a circumstance that would not compel disqualification under § 455(b), but that might be covered by § 455 (a), the neutral shall promptly disclose that circumstance to all counsel in writing, as well as the ADR Unit. A party who has an objection to the neutral based upon an allegation that the neutral has a conflict of interest shall present this objection in writing to the ADR Unit within 10 calendar days of learning the source of the potential conflict or shall be deemed to have waived objection.

(e) Immunities. All lawyers serving as neutrals in any of the court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

2-6. Evaluation of ADR Programs.

ADR Local Rules

Congress has mandated that the court's ADR programs be evaluated. Neutrals, counsel and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned judge or in any report.

3. ADR MULTI-OPTION PROGRAM

3-1. Purpose.

The ADR Multi-Option Program is designed to encourage litigants in a broad range of cases to use ADR and to provide parties with sophisticated assistance in identifying the ADR process that is best suited to their particular case.

3-2. Summary Description.

Litigants in certain cases designated when the complaint or notice of removal is filed are presumptively required to participate in one non-binding ADR process offered by the court (Arbitration, Early Neutral Evaluation, Mediation, or Early Settlement Conference with a magistrate judge) or, with the assigned judge's permission, may substitute an ADR process offered by a private provider. Unless they have stipulated to an ADR process, counsel may be required to participate in a joint telephone conference with the court's ADR Director or ADR Program Counsel to consider the suitability of the ADR options for their case. When litigants have not stipulated to an ADR process before the case management conference, the assigned judge will discuss the ADR options with counsel at that conference. If the parties cannot agree on a process before the end of the case management conference, the judge will select one of the ADR processes offered by the court unless persuaded that no ADR process is likely to deliver benefits to the parties sufficient to justify the resources consumed by its use.

Cross Reference

See Civil L.R. 16-14 "*Case Management Conference.*"

3-3. Assignment to ADR Multi-Option Program.

(a) Automatic Assignment. Appropriate civil cases may be assigned to the ADR Multi-Option Program by the clerk when the complaint or notice of removal is filed. Notice of such assignment will be given in the initial case management schedule issued to the filing or removing party.

ADR Local Rules

(b) By Stipulation, Motion or Order. Cases not assigned at filing may be assigned to the ADR Multi-Option Program by order of the assigned judge following a stipulation by all parties, on motion by a party under Civil L.R. 7, or on the judge's initiative.

3-4. ADR Options.

(a) **Court-Sponsored ADR Programs.** The court-sponsored ADR options for cases assigned to the ADR Multi-Option Program include:

- (1) Non-binding Arbitration;
- (2) Early Neutral Evaluation (ENE);
- (3) Mediation; and
- (4) Early Settlement Conference with a magistrate judge.

(b) **Private ADR.** A private ADR procedure, to be conducted within the time frames set forth in these ADR local rules, may be substituted for a court program if the parties so stipulate and the assigned judge approves.

3-5. Selecting an ADR Process.

(a) **Selection by Prompt Stipulation.** In cases assigned to the ADR Multi-Option Program, as soon as feasible after filing or removal, counsel shall confer to attempt to agree on an ADR process. If counsel agree on an ADR process, they shall file, as soon as feasible, a stipulation and proposed order designating which specific ADR process the parties have selected, the deadline for conducting the ADR session, and setting forth any other information the parties would like the court to know. If the parties file a stipulation selecting an ADR procedure before the date set for the ADR telephone conference, as set forth in ADR L.R. 3-5(b)(4), the ADR telephone conference shall not take place.

ADR L.R. 3-5

(b) Selection Through ADR Telephone Conference. In cases assigned to the ADR Multi-Option Program, counsel may be notified by the court that they are required to participate in a joint ADR telephone conference at a time designated by the court. During the telephone conference, the ADR Director or ADR Program Counsel will provide information to help counsel identify the ADR process that is likely to benefit their particular case the most. The following procedures shall apply to the ADR telephone conference:

(1) Participants. Counsel who will be primarily responsible for handling the trial of the matter shall participate in the conference. Clients and their insurance carriers are encouraged to participate as well. Counsel may request an in-person ADR conference at the court in lieu of the telephone conference by calling the ADR Unit.

(2) Placing the Conference Call. Counsel for the first-listed plaintiff in the case caption shall arrange for and place the telephone conference by calling all other counsel and then the ADR telephone conference number, (415) 522-4603, at the appointed time. The court will reserve one-half hour for each such conference call.

(3) Preparation. Before the telephone conference, counsel shall review with their clients both the brochure entitled *Dispute Resolution Procedures in the Northern District of California* and these ADR local rules.

(4) Exemption from ADR Telephone Conference. Counsel shall be exempted from participating in the telephone conference if, before the date of the conference, they file a stipulation and proposed order selecting an ADR process under ADR L.R. 3-5(a) and send a copy to the ADR Unit. If the stipulation is filed fewer than five days before the telephone conference, counsel must call the ADR Unit at least 24 hours in advance of the scheduled conference to request that it be taken off-

ADR Local Rules

calendar.

(5) Request to Continue the ADR Telephone Conference. Requests to continue the ADR telephone conference shall be directed to the ADR Unit at (415) 522-2199.

(6) Stipulation Following ADR Telephone Conference.

Parties who stipulate to an ADR procedure after the telephone conference may do so on a form provided by the court pursuant to ADR L.R. 3-5(a) or in their case management statement. Counsel shall send a copy of the stipulation to the ADR Unit.

(c) Selection at Case Management Conference.

(1) Consideration of Options. If the parties do not stipulate to an ADR option before the case management conference, the assigned Judge will discuss with the parties the selection of an option at that conference. The ADR Director or ADR Program Counsel may consult with the Judge before the case management conference and may recommend a specific ADR option for the case.

(2) Selection by Stipulation or Order. If the parties agree to a particular ADR option at the case management conference and the assigned judge approves, the judge will issue an order referring the case to that program. If the parties do not agree to an ADR process, and the judge deems it appropriate, he or she will select one of the court ADR programs (non-binding arbitration, subject to statutory jurisdictional constraints; ENE; mediation; or an early settlement conference with a magistrate judge) and issue an order referring the case to that program.

(3) Exemption. If the parties persuade the judge at the case management conference that no ADR process is likely to deliver benefits to the parties sufficient to justify the resources consumed by its use, the judge will exempt the case from participating in an ADR process.

3-6. Timing of ADR Process in the ADR Multi-Option Program.

Unless otherwise ordered, a non-binding arbitration shall be conducted

ADR Local Rules

within 135 days after the initial case management conference or issuance of the initial case management order, whichever occurs first. An ENE session, mediation or an early settlement conference with a magistrate judge shall be conducted within 90 days after the initial case management conference or issuance of the initial case management order, whichever occurs first.

4. NON-BINDING ARBITRATION

4-1. Description.

Arbitration under this local rule is essentially an adjudicative process in which an arbitrator or a panel of three arbitrators issues a non-binding judgment ("award") on the merits after an expedited, adversarial hearing. Either party may reject the non-binding award and request a trial *de novo*. An arbitration occurs earlier in the life of a case than a trial and is less formal and less expensive. Because testimony is taken under oath and is subject to cross-examination, arbitration can be especially useful in cases that turn on credibility of witnesses.

4-2. Automatic Referral to Arbitration.

(a) **Eligible Cases.** Pursuant to 28 U.S.C. § 651, any of the following civil actions seeking only money damages in an amount not exceeding \$150,000, exclusive of punitive damages, interest, costs and attorney fees, and which are not assigned to the ADR Multi-Option Program, may be referred automatically by the clerk to the arbitration program at filing:

(1) **When United States is Not a Party.** Actions in which the United States is not a party which are founded on diversity of citizenship (28 U.S.C. § 1332), federal question (28 U.S.C. § 1331), admiralty or maritime jurisdiction (28 U.S.C. § 1333), and which arise under a contract or written instrument but do not allege violations of civil rights, or which arise out of personal injury or property damage.

(2) **When United States is a Party.** Actions in which the United States is a party which arise under the Federal Tort Claims Act (28 U.S.C. § 2671, et seq.); the Longshoremen's and Harbor Workers Act (33 U.S.C. § 901, et seq.); the Miller Act (40 U.S.C. § 270b), when the United States has no monetary interest in the claim; or the Suits in Admiralty Act (46 U.S.C. § 741, et seq., §

ADR Local Rules

781 et seq.) which involve no general average.

(b) Determination of Monetary Claim.

(1) Separate Certification. In all cases otherwise subject to arbitration under this rule, the court shall presume the damages claim to be for less than \$150,000, exclusive of punitive damages, interest, costs and attorney fees, unless counsel asserting the claim files a separate certification that the damages reasonably recoverable exceed \$150,000, exclusive of punitive damages, interest, costs and attorney fees. Any such certification must be filed by plaintiff within 30 days after the case was filed in this court or by defendant at the time of filing a counterclaim or cross-claim.

(2) Determination. Notwithstanding the amount of damages alleged in a party's pleading or certification under ADR L.R. 4-2(b)(1), the assigned judge may, acting *sua sponte* or in response to a motion under Civil L.R. 7, and after affording the parties an opportunity to be heard, require arbitration if satisfied that recoverable damages cannot reasonably exceed \$150,000, exclusive of punitive damages, interest, costs and attorney fees.

(c) Relief from Automatic Referral. The assigned judge may, *sua sponte* or on motion by any party under Civil L.R. 7 brought within 20 days after the filing of the last responsive pleading, exempt any case from arbitration if the objectives of arbitration would not be realized because:

- (1) The case involves complex or novel legal issues;
- (2) Legal issues predominate over factual issues; or
- (3) For other good cause shown.

4-3. Referral by Stipulation or Order of the Court.

ADR Local Rules

(a) By Order of the Assigned Judge. A case that was not referred to arbitration at filing, but otherwise meets the criteria for automatic referral to arbitration as set forth in ADR L.R. 4-2, may be referred to arbitration by order of the assigned judge following a stipulation by all parties, on motion by a party under Civil L.R. 7, or on the judge's initiative.

ADR L.R. 4-3

(b) By Stipulation. A case that does not meet the criteria for automatic referral to arbitration at filing as set forth in ADR L.R. 4-2 may be referred to arbitration by order of the assigned judge only upon the written consent of all parties. Consent must be given freely and knowingly and no party or attorney in any such case may be prejudiced for refusing to consent to participate in arbitration. If consent is not given by all parties, no judge to whom the case might be assigned shall be advised of the identity of any party or attorney who elected not to consent to arbitration.

4-4. Arbitrators.

(a) Selection. After entry of an order referring the case to arbitration, and upon ascertaining the identity of counsel for the parties to the action, the clerk shall promptly furnish to each party a list of ten arbitrators randomly selected from the court's panel. The parties shall then confer in the following manner to select a single arbitrator or, if all parties so request in writing, a panel of three arbitrators:

(1) Striking Names. Each side shall be entitled to strike two names from the list, plaintiff(s) to strike the first name, defendant(s) the next, then plaintiff(s) and then defendant(s).

(2) Ranking Names. The parties shall then select the arbitrator or panel from the remaining six names by alternately selecting one name; defendant(s) to make the first choice, plaintiff(s) the next, and continuing in this fashion.

(3) Submitting List. Within ten days of receipt of the original list of ten names, the parties shall list the six names in the order selected and submit them to the clerk. If the parties fail to submit such a list within the prescribed time, the clerk shall select an arbitrator at random from the original list of ten names.

ADR L.R. 4-4

(4) Notification by Clerk. The clerk shall promptly notify the person or persons whose names appear as the parties' first choice or choices of their selection, or, if the parties have not chosen, the person(s) the clerk has selected. If any person so selected is unable or unwilling to serve, the clerk shall notify the person whose name appears next on the list. If the clerk is unable to select an arbitrator or constitute a panel of arbitrators from the six selections, the process of selection under this Rule shall be repeated. When the requisite number of arbitrators has agreed to serve, the clerk shall promptly send written notice of the selections to the arbitrator(s) and to the parties. The rules governing conflicts of interest and the procedure for objecting to an arbitrator are set forth in ADR L.R. 2-5(d). When a panel of three arbitrators is selected, the clerk shall designate the person to serve as the panel's presiding arbitrator.

(b) Compensation. Arbitrators shall be paid by the court \$250 per day or portion of each day of hearing in which they serve as a single arbitrator or \$150 for each day or portion of each day in which they serve as a member of a panel of three.

(c) Payment and Reimbursement. When filing an award, arbitrators shall submit a voucher on the form prescribed by the clerk for payment of compensation and for reimbursement of any transportation expenses necessarily incurred in the performance of duties under this Rule. No reimbursement will be made for any other expenses.

4-5. Timing and Scheduling the Hearing.

(a) Hearing Date. The clerk shall set a date for hearing not less than 20 nor more than 120 days after the clerk has been informed of the parties' ranking in accordance with ADR L.R. 4-4(a)(3) (or of the clerk's random selection in accordance with ADR L.R. 4-4(a)(4)). This date shall not be continued or vacated except for extreme and unanticipated emergencies as established in writing and approved by the assigned Judge. If the case is resolved before the hearing date, or if due to an emergency a participant cannot attend the arbitration, counsel shall notify the arbitrator and the ADR Unit immediately

ADR Local Rules

upon learning of such settlement or emergency.

ADR L.R. 4-5

(b) Postponement Due to Motion. Unless all parties stipulate in writing or the assigned Judge orders otherwise for good cause shown, no arbitration hearing may commence until 30 days after disposition by the court of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties, or motion for summary judgment, provided such motion was filed and served within 30 days after the filing of the last responsive pleading.

(c) Place and Time. The hearing may be held at any location within the Northern District of California selected by the arbitrator(s), including a room at a federal courthouse, if available. In selecting the location, the arbitrator(s) shall consider the convenience of the parties and witnesses. Unless the parties agree otherwise, the hearing shall be held during normal business hours.

4-6. Discovery.

Notwithstanding the provisions of Civil L.R. 16-3 or the Federal Rules, in cases assigned to arbitration, parties may serve requests for discovery within 30 days after service of the complaint or notice of removal. All discovery shall be concluded no fewer than 20 days before the arbitration and may not be reopened after the arbitration except on order of the assigned judge for good cause shown.

4-7. *Ex Parte* Contact Prohibited.

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and an arbitrator.

4-8. Written Arbitration Statements.

(a) Time for Submission. No later than 10 calendar days before the arbitration session, each party shall submit directly to the arbitrator(s), and shall serve on all other parties, a written arbitration statement.

(b) Prohibition against Filing. The statements shall not be filed and the assigned judge shall not have access to them.

(c) Content of Statement. The statements shall be concise and shall:

- (1)** Summarize the claims and defenses;
- (2)** Identify the significant contested factual and legal issues, citing authority on the questions of law;
- (3)** Identify proposed witnesses; and
- (4)** Identify, by name and title or status, the person(s) with decision-making authority, who, in addition to counsel, will attend the arbitration as representative(s) of the party.

(d) Modification of Requirement by Arbitrator(s). After jointly consulting counsel for all parties, the arbitrator(s) may modify or dispense with the requirements for the written arbitration statements.

4-9. Optional Telephone Conference Before Arbitration.

The arbitrator(s) may schedule a brief joint telephone conference with counsel before the arbitration to discuss matters such as the procedures to be followed, whether supplemental written material should be submitted, which witnesses will attend, how testimony will be presented, including expert testimony, and whether and how the arbitration will be recorded.

4-10. Attendance at Arbitration.

(a) Attendance of Party and Counsel. Each party and its lead trial counsel shall attend the arbitration hearing unless excused under paragraph (b), below. This requirement reflects the court's view that principal values of arbitration include affording litigants an opportunity to articulate their positions and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case.

- (1) Corporation or Other Entity.** A party other than a

ADR Local Rules

natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who is knowledgeable about the facts of the case.

(2) Government Entity. A party that is a government or governmental agency, in addition to counsel, shall send a representative knowledgeable about the facts of the case and the governmental unit's position. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

(b) Counsel. Each party shall be accompanied at the arbitration session by the lawyer who will be primarily responsible for handling the trial of the matter.

(c) Request to be Excused. A party may be excused from attending an arbitration in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A party seeking to be excused must submit, no fewer than 15 days before the date set for the arbitration, a letter to the ADR Magistrate Judge, copying other counsel and the arbitrator(s). The letter shall:

(1) Set forth with specificity all considerations that support the request;

(2) State realistically the amount in controversy in the case;

(3) Indicate whether the other party or parties join in or object to the request; and

(4) Be accompanied by a proposed order.

(d) Participation by Telephone. A party excused from attending an arbitration in person shall be available to participate by telephone.

4-11. Authority of Arbitrators and Procedures at Arbitration.

(a) **Authority of Arbitrators.** Subject to the provisions of these ADR local rules, arbitrators shall be authorized to:

(1) Administer oaths and affirmations;

(2) Make reasonable rulings as are necessary for the fair and efficient conduct of the hearing; and

(3) Make awards.

(b) **Presumption against Bifurcation.** Except in extraordinary circumstances, the arbitrator(s) shall not bifurcate the arbitration.

(c) **Quorum.** Where a panel of three arbitrators has been named, any two members of a panel shall constitute a quorum, but the concurrence of a majority of the entire panel shall be required for any action or decision by the panel, unless the parties stipulate otherwise.

(d) **Testimony.**

(1) **Subpoenas.** Attendance of witnesses and production of documents may be compelled in accordance with FRCivP 45.

(2) **Oath and cross-examination.** All testimony shall be taken under oath or affirmation and shall be subject to such reasonable cross-examination as the circumstances warrant.

(3) **Evidence.** In receiving evidence, the arbitrator(s) shall be guided by the Federal Rules of Evidence, but shall not thereby be precluded from receiving evidence which the arbitrator(s) consider(s) relevant and trustworthy and which is not privileged.

(e) **Transcript or Recording.** A party may cause a transcript or

ADR Local Rules

recording of the proceedings to be made but shall provide a copy to any other party who requests it and who agrees to pay the reasonable costs of having a copy made.

ADR L.R. 4-12

(f) Default of Party. The unexcused absence of a party shall not be a ground for continuance, but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s).

4-12. Award and Judgment.

(a) Form of Award. An award shall be made after an arbitration under this Rule. Such an award shall state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money, if any, awarded. It shall be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No arbitrator shall participate in the award without having attended the hearing. Costs within the meaning of FRCivP 54 and Civil L.R. 54-3 may be assessed by the arbitrator(s) as part of an arbitration award.

(b) Filing and Serving the Award. Within 10 days after the arbitration hearing is concluded, the arbitrator(s) shall file the award with the clerk in an unsealed envelope with a cover sheet stating: "Arbitration Award to be filed under seal pursuant to ADR L.R. 4-12--not to be forwarded to the Assigned Judge." The cover sheet also shall list the case caption, case number and name(s) of the arbitrator, but shall not specify the content of the award. The clerk shall promptly serve copies of the arbitration award on the parties. In addition, immediately after receiving a copy of the arbitration award, the party that prevailed in the arbitration shall serve a copy of the award on the other parties and shall promptly file proof of said service under Civil L.R. 5-4, but shall not attach a copy of the award.

(c) Sealing of Award. Each filed arbitration award shall promptly be sealed by the clerk. The award shall not be disclosed to any judge who might be assigned to the case until the court has entered final judgment in the action or the action has been otherwise terminated, except as necessary to assess costs or prepare the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

ADR Local Rules

(d) Entry of Judgment on Award. If no party has filed a demand for trial *de novo* (or a notice of appeal, which shall be treated as a demand for trial *de novo*) within 30 days of notice of the filing of the arbitration award, the clerk shall enter judgment on the arbitration award in accordance with FRCivP 58. A judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

4-13. Trial *De Novo*.

(a) **Time for Demand.** If any party files and serves a demand for trial *de novo* within 30 days of notice of the filing of the arbitration award, no judgment thereon shall be entered by the clerk and the action shall proceed in the normal manner before the assigned judge. Failure to file and serve a demand for trial *de novo* within this 30-day period waives the right to trial *de novo*.

(b) **Limitation on Admission of Evidence.** At the trial *de novo* the court shall not admit any evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless:

(1) The evidence would otherwise be admissible in the trial under the Federal Rules of Evidence, or

(2) The parties have otherwise stipulated.

4-14. Stipulation to Binding Arbitration

At any time before the arbitration hearing, the parties may stipulate in writing to waive their rights to request a trial *de novo* pursuant to ADR L.R. 4-13. Such stipulation shall be submitted to the assigned judge for approval and shall be filed. In the event of such stipulation, judgment shall be entered on the arbitration award pursuant to ADR L.R. 4-12(d).

4-15. Federal Arbitration Act Presumptively Inapplicable.

The Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.*) has no application to any arbitration conducted under this rule, at least absent a written agreement between all parties that is entered before the arbitration and that effectively invokes the jurisdiction of that statute.

5. EARLY NEUTRAL EVALUATION

5-1. Description.

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, present summaries of their cases and receive a non-binding evaluation by an experienced neutral lawyer with subject matter expertise. The evaluator also helps identify areas of agreement, provides case-planning guidance and, if requested by the parties, settlement assistance.

5-2. Automatic Referral to ENE.

(a) **Eligible Cases.** Civil cases that fall within the Nature of Suit categories set forth in subsection (1), below, that are not excepted under subsection (2), and that are neither assigned to the ADR Multi-Option Program nor referred to arbitration, may be referred to the ENE program by the clerk at filing, subject to the availability of qualified evaluators and the court's administrative resources:

(1) **Nature of Suit.** Suits designated on the Civil Cover Sheet as: CONTRACT: Insurance (110), Miller Act (130), Negotiable Instrument (140), Stockholders' Suits (160), Other Contract (190), and Contract Product Liability (195); TORTS: Motor Vehicle (350), Motor Vehicle Product Liability (355), Other Personal Injury (360), Personal Injury-Product Liability (365), and Other Fraud (370); CIVIL RIGHTS: Employment (442); PROPERTY RIGHTS: Copyrights (820), Patent (830), and Trademark (840); and OTHER STATUTES: Antitrust (410), Racketeer Influenced and Corrupt Organizations (470), and Securities/Commodities /Exchange (850).

(2) **Excepting Criteria.** Class actions, cases not designated on the Civil Cover Sheet as Copyrights (820), Patent (830), and Trademark (840) in which the principal relief sought is

ADR Local Rules

injunctive, or in which one or more of the parties is proceeding *in pro per*, shall not be referred automatically to the ENE program. Cases in which a declaratory judgment is sought may be referred automatically to the program except when the only parties to the action are insurance carriers, sureties, or bonding companies.

ADR L.R. 5-2

(b) Relief from Automatic Referral. A party who believes that some extraordinary circumstance makes it unfair to have its case go through the ENE process may file with the assigned judge a motion for relief from referral, but must do so within 10 calendar days of receiving notice that the case has been designated for the program. Such motions shall be made in accordance with Civil L.R. 7, shall set forth in detail the considerations supporting the motion, and shall indicate realistically the amount in controversy in the case. Copies shall be sent to all other parties, the ADR Unit, and the evaluator, if appointed.

5-3. Referral by Stipulation, Motion or Order.

Subject to the availability of administrative resources and of an evaluator with subject matter expertise, appropriate civil cases that were not referred to ENE at filing may be referred to ENE by order of the assigned judge following a stipulation by all parties, on motion by a party under Civil L.R. 7, or on the judge's initiative.

5-4. Evaluators.

(a) Assignment. After entry of an order referring a case to ENE, and upon ascertaining the identity of counsel for the parties to the action, the ADR Unit will appoint from the court's panel an evaluator who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest. The court will notify the parties of the appointment. The rules governing conflicts of interest and the procedure for objecting to an evaluator on that basis are set forth in ADR L.R. 2-5(d).

(b) Compensation. ENE evaluators shall volunteer their preparation time and the first four hours in an ENE session. After four hours in an ENE session, the evaluator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the evaluator for additional time at an hourly rate of \$150. The ENE procedure will continue only if all parties and the evaluator agree. After eight hours in one or more ENE sessions, if all parties agree, the evaluator may charge his or her hourly rate or such other rate that all parties agree to pay.

ADR Local Rules

(c) **Payment.** All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the evaluator directly. On a form provided by the court, the evaluator shall promptly report to the ADR Unit the amount of any payment received.

5-5. Timing and Scheduling the ENE Session.

(a) **Scheduling by Evaluator.** Promptly after being appointed to a case, the evaluator shall arrange for the pre-session phone conference under ADR L.R. 5-8 and shall fix the date and place of the ENE session within the deadlines set by this rule or the order referring the case to ENE.

(b) **Deadline for Conducting Session.** Unless otherwise ordered by the assigned judge for good cause shown, the ENE session shall be held within the following deadlines:

(1) **Cases Referred to ENE When Filed.** In cases referred to ENE when filed, the ENE session shall be held within 150 days of the filing of the complaint or notice of removal or within 60 days of the clerk's issuance of a notice appointing the evaluator.

(2) **Cases in ADR Multi-Option Program.** In cases referred to ENE through the ADR Multi-Option program, the ENE session shall be conducted within 90 days after the initial case management conference or the issuance of the initial case management order, whichever occurs first.

(3) **Cases Neither Referred When Filed Nor in the ADR Multi-Option Program.** In cases not in the ADR Multi-Option Program that are referred to ENE sometime after filing, the court shall fix the time frame for the ENE session.

5-6. Requests to Extend Deadline.

(a) **Motion Required.** Requests for extension of the deadline for conducting an ENE session shall be made no later than 15 days before the session is to be held and shall be directed to the assigned judge, in a motion under Civil L.R. 7-10, with a copy to the other parties, the evaluator (if appointed) and the ADR Unit.

(b) **Content of Motion.** Such motion shall:

ADR Local Rules

- (1) Detail the considerations that support the request;
- (2) Indicate whether the other parties concur in or object to the request; and

(3) Be accompanied by a proposed order setting forth a new deadline by which the ENE session shall be held.

5-7. *Ex Parte* Contact Prohibited.

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and the evaluator until after the evaluator has committed his or her evaluation to a writing and all parties have agreed that *ex parte* communications with the evaluator may occur.

5-8. Telephone Conference Before ENE Session.

The evaluator shall schedule a brief joint telephone conference with counsel before the ENE session to discuss matters such as the scheduling of the ENE session, the procedures to be followed, the nature of the case, and which client representatives will attend.

5-9. Written ENE Statements.

(a) **Time for Submission.** No later than 10 calendar days before the first ENE session, each party shall submit directly to the evaluator, and shall serve on all other parties, a written ENE Statement.

(b) **Prohibition Against Filing.** The statements shall not be filed and the assigned judge shall not have access to them.

(c) **Content of Statement.** The statements shall be concise, may include any information that may be useful to the evaluator, and shall:

(1) Identify, by name and title or status:

(A) The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE session as representative(s) of the party, and

(B) Persons connected with a party opponent (including an insurer representative) whose presence

ADR Local Rules

might substantially improve the utility of the ENE session or the prospects for settlement;

(2) Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

(3) Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

(4) Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations;

(5) Describe the history and status of any settlement negotiations; and

(6) Include copies of documents out of which the suit arose (*e.g.*, contracts), or whose availability would materially advance the purposes of the evaluation session, (*e.g.*, medical reports or documents by which special damages might be determined).

5-10. Special Provisions for Patent, Copyright, or Trademark Cases.

(a) **Patent Cases.** A party who bases a claim on a patent shall attach to its written statement an element-by-element analysis of the relationship between the applicable claims in the patent and the allegedly infringing product. Also the party shall describe in its written statement its theory or theories of damages and shall set forth all available information that supports each theory. A party who asserts a defense against the patent based on "prior art" shall attach an exhibit that identifies each known example of alleged prior art and that describes the relationship between each such example of prior art and the claims of the patent. In addition, if such party denies infringement, it shall describe the basis for such denial.

(b) **Copyright Cases.** A party who bases a claim on copyright shall include as exhibits the copyright registration and exemplars of both the copyrighted work and the allegedly infringing work, and shall make a systematic comparison showing points of similarity. Such party shall also present whatever direct or indirect evidence it has of copying, and shall indicate whether it intends

ADR Local Rules

to elect statutory or actual damages. Each party in a copyright case who is accused of infringing shall set forth in its written statement the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made.

ADR L.R. 5-10

(c) Trademark Cases. A party who bases a claim on trademark or trade dress infringement, or on other unfair competition, shall include as an exhibit its registration, if any, exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used, and any evidence it has of actual confusion. If "secondary meaning" is in issue, such a party shall also describe the nature and extent of the advertising it has done with its mark and the volume of goods it has sold under its mark. Both parties shall describe in their evaluation statements how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence. Each party in a trademark or unfair competition case who is accused of infringement shall set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark.

5-11. Attendance at Session.

(a) Parties. The parties themselves and their counsel are required to attend the ENE session unless excused under paragraph (c), below. This requirement reflects the court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions.

(1) Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle and who is knowledgeable about the facts of the case.

(2) Government Entity. A party that is a government or governmental agency, in addition to counsel, shall send a representative knowledgeable about the facts of the case and the governmental unit's position, and who has, to the greatest extent feasible, authority to settle. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

ADR L.R. 5-11

(b) Counsel. Each party shall be accompanied at the ENE session by the lawyer who will be primarily responsible for handling the trial of the matter.

(c) Request to be Excused. A party may be excused from attending an ENE session in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A party seeking to be excused must submit, no fewer than 15 days before the date set for the session, a letter to the ADR Magistrate Judge, providing copies to other counsel and to the evaluator. The letter shall:

- (1)** Set forth all considerations that support the request;
- (2)** State realistically the amount in controversy in the case;
- (3)** Indicate whether the other party or parties join in or object to the request, and
- (4)** Be accompanied by a proposed order.

(d) Participation by Telephone. A party excused from appearing in person at an ENE session shall be available to participate by telephone.

5-12. Procedure at ENE Session.

(a) Components of ENE Session.

The evaluator shall:

- (1)** Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principle evidence on which they are based;
- (2)** Help the parties identify areas of agreement and, where feasible, enter stipulations;
- (3)** Assess the relative strengths and weaknesses of the

ADR Local Rules

parties' contentions and evidence, and explain carefully the reasoning that supports these assessments;

(4) If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case;

(5) Estimate, where feasible, the likelihood of liability and the dollar range of damages;

(6) Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

(7) Help the parties assess litigation costs realistically; and

(8) Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

(b) Process Rules. The session shall be informal. Rules of evidence shall not apply and there shall be no formal examination or cross-examination of witnesses.

(c) Evaluation and Settlement Discussions. If all parties stipulate, they may proceed to discuss settlement after the evaluation has been written but before it is presented. The evaluation shall be presented on demand by any party.

5-13. Confidentiality.

(a) Confidential Treatment. This court, the evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as confidential all written and oral communications made in connection with or during any ENE session. The court hereby extends to all such communications all the protection afforded by FREvid 408 and by FRCivP 68. In addition, unless otherwise stipulated by all parties and the evaluator, the court hereby prohibits disclosure of any written or oral communication made by any party, counsel, evaluator or other participant in connection with or during any ENE session to anyone not involved in the litigation. Nor may such communication, absent stipulation by all parties and the evaluator, be disclosed to the assigned judge or used for any purpose, including impeachment, in any pending or future proceeding in this court. This rule does not preclude a report to or an inquiry by

ADR Local Rules

the ADR Magistrate Judge pursuant to ADR L.R. 2-4(a) regarding a possible violation of the ADR Local Rules. Nor does this rule prohibit the evaluator from discussing the ENE session with the court's ADR staff who shall maintain the confidentiality of the ENE session.

(b) Confidentiality Agreement. The ENE evaluator may ask the parties and all persons attending the ENE session to sign a confidentiality agreement on a form provided by the court.

(c) Stipulation. Communications made in connection with or during an ENE proceeding may be disclosed only if all parties and the evaluator so agree. Nothing in this section shall be construed to prohibit parties from entering written agreements resolving some or all of the case or entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with an ENE session.

5-14. Follow Up.

(a) Discussion at Close of ENE. At the close of the ENE session, the evaluator and the parties shall discuss whether it would be beneficial to schedule any follow up to the session.

(b) Follow Up the Evaluator May Order. The evaluator may order these kinds of follow up without stipulation:

(1) Responses to settlement offers or demands;

(2) A focused telephone conference;

(3) Exchanges of letters between counsel addressing specified legal or factual issues; or

(4) Written or telephonic reports to the evaluator, *e.g.*, describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement.

(c) Stipulation to Follow Up Session. With the consent of all parties, the evaluator may schedule one or more follow up ENE sessions that may include additional evaluation, settlement discussions, or case development planning.

ADR Local Rules

(d) Limitations on Authority of Evaluator. Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

5-15. Certification of Session.

Within 10 days of the close of each ENE session, and on the form Certification of Session provided by the court, the evaluator shall report to the ADR Unit: the date of the session, whether any follow up is scheduled, whether the case settled in whole or in part, and any stipulations the parties agree may be disclosed. The ADR Unit will file the certification.

6. MEDIATION

6-1. Description.

Mediation is a flexible, non-binding, confidential process in which a neutral lawyer-mediator facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

6-2. Eligible Cases.

Subject to the availability of administrative resources and of a suitable mediator, appropriate civil cases may be referred to mediation by order of the assigned judge following a stipulation by all parties, on motion by a party under Civil L.R. 7-10, or on the judge's initiative.

6-3. Mediators.

(a) **Assignment.** After entry of an order referring a case to mediation, the ADR Unit will appoint from the court's panel a mediator who is available during the appropriate period and has no apparent conflict of interest. The court will notify the parties of the appointment. The rules governing conflicts of interest and the procedure for objecting to a mediator on that basis are set forth in ADR L.R. 2-5(d).

(b) **Compensation.** Mediators shall volunteer their preparation time and the first four hours in a mediation. After four hours of mediation, the mediator may either (1) continue to volunteer his or her time or (2) give the parties the option of concluding the procedure or paying the mediator for additional time at an hourly rate of \$150. The procedure will continue only if all parties and the mediator agree. After eight hours in one or more mediation sessions, if all

ADR Local Rules

parties agree, the mediator may charge his or her hourly rate or such other rate that all parties agree to pay.

(c) **Payment.** All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the mediator directly. The mediator shall promptly report to the ADR Unit, on a form provided by the court, the amount of any payment received.

6-4. Timing and Scheduling the Mediation.

(a) **Scheduling by Mediator.** Promptly after being appointed to a case, the mediator shall arrange for the pre-mediation conference under ADR L.R. 6-6 and shall fix the date and place of the mediation within the deadlines set by paragraph (b), below, or the order referring the case to mediation.

(b) **Deadline for Conducting Mediation.** Unless otherwise ordered, the mediation shall be held within 90 days after the initial Case Management Conference or issuance of the initial case management order, whichever occurs first.

6-5. Request To Extend the Deadline.

(a) **Motion Required.** Requests for extension of the deadline for conducting a mediation shall be made no later than 15 days before the session is to be held and shall be directed to the assigned judge, in a motion under Civil L.R. 7-10, with a copy to the other parties, the mediator (if appointed) and the ADR Unit.

(b) **Content of Motion.** Such motion shall:

- (1) Detail the considerations that support the request;
- (2) Indicate whether the other parties concur in or object to the request; and
- (3) Be accompanied by a proposed order setting forth a new deadline by which the mediation shall be held.

6-6. Telephone Conference Before Mediation.

ADR Local Rules

The mediator shall schedule a brief joint telephone conference with counsel before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, and which client representatives will attend.

6-7. Written Mediation Statements.

(a) Time for Submission. No later than 10 calendar days before the first mediation session, each party shall submit directly to the mediator, and shall serve on all other parties, a written Mediation Statement.

(b) Prohibition Against Filing. The statements shall not be filed and the assigned Judge shall not have access to them.

(c) Content of Statement. The statements shall:

(1) Identify, by name and title or status:

(A) The person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party, and

(B) Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the mediation or the prospects for settlement;

(2) Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

(3) Identify the discovery or motions that promise to contribute most to equipping the parties for meaningful settlement negotiations;

(4) Describe the history and current status of any settlement negotiations and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement; and

(5) Include copies of documents likely to make the mediation more productive or to materially advance settlement prospects.

6-8. Contact with Mediator Before the Mediation.

Before the mediation, the mediator may ask each party to submit only to the mediator an additional confidential written statement or may discuss the case in confidence with a lawyer during a telephone conversation. The mediator shall not disclose any party's confidential communication without permission.

6-9. Attendance at Session.

(a) Parties. The parties themselves and their counsel are required to attend the mediation unless excused under paragraph (c), below. This requirement reflects the court's view that principal values of mediation include affording litigants opportunities to articulate directly to the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.

(1) Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle and who is knowledgeable about the facts of the case.

(2) Government Entities. A party that is a government or governmental agency, in addition to counsel, shall send a representative knowledgeable about the facts of the case and the governmental unit's position, and who has, to the greatest extent feasible, authority to settle. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

(b) Counsel. Each party shall be accompanied at the mediation by the lawyer who will be primarily responsible for handling the trial of the matter.

ADR L.R. 6-9

(c) Request to be Excused. A party may be excused from attending a mediation session in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A party seeking to be excused must submit, no fewer than 15 days before the date set for the mediation, a letter to the ADR Magistrate Judge, providing copies to all counsel and the mediator. The letter shall:

- (1) Set forth all considerations that support the request;
- (2) State realistically the amount in controversy in the case;
- (3) Indicate whether the other party or parties join in or object to the request, and
- (4) Be accompanied by a proposed order.

(d) Participation by Telephone. A party excused from appearing in person at a mediation shall be available to participate by telephone.

6-10. Procedure at Mediation.

(a) Procedure. The mediation shall be informal. Mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case.

(b) Separate Caucuses. The mediator may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the clients only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

6-11. Confidentiality.

(a) Confidential Treatment. This court, the mediator, all counsel and parties, and any other persons attending the mediation shall treat as confidential all written and oral communications made in connection with or during any mediation session. The court hereby extends to all such communications all the protection afforded by FREvid 408 and by FRCivP 68. In addition, unless otherwise stipulated by all parties and the mediator, the court hereby prohibits disclosure of any written or oral communication made by any party, counsel, mediator or other participant in connection with or during any mediation to anyone not involved in the litigation. Nor may such communication, absent stipulation by all parties and the mediator, be disclosed to the assigned judge or used for any purpose, including impeachment, in any pending or future proceeding in this court. This rule does not preclude a report to or an inquiry by the ADR Magistrate Judge pursuant to ADR L.R. 2-4(a) regarding a possible violation of the ADR Local Rules. Nor does this rule prohibit the mediator from discussing the mediation session with the court's ADR staff who shall maintain the confidentiality of the mediation.

(b) Confidentiality Agreement. The mediator may ask the parties and all persons attending the mediation to sign a confidentiality agreement on a form provided by the court.

(c) Stipulation. Communications made in connection with or during a mediation may be disclosed only if all parties and the mediator so agree. Nothing in this section shall be construed to prohibit parties from entering written agreements resolving some or all of the case or entering and filing procedural or factual stipulations based on suggestions or agreements made in connection with a mediation.

6-12. Follow Up.

At the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule a follow up session. Such follow up could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, or another mediation session.

ADR Local Rules

6-13. Certification of Session.

Within 10 days of the close of each mediation session and on the form Certification of Session provided by the court, the mediator shall report to the ADR Unit: the date the session was held, whether the case settled in whole or in part, whether any follow up is scheduled, and any stipulations the parties agree may be disclosed. The ADR Unit will file the certification.

7. SETTLEMENT CONFERENCES

7-1. Description.

In a settlement conference, a judicial officer, usually a magistrate judge, facilitates the parties' efforts to negotiate a settlement. Some settlement judges also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and assist in formulating resolutions. A settlement judge might articulate views about the merits of the case or the relative strengths and weaknesses of the parties' legal positions.

7-2. Referral to a Settlement Conference.

The court may refer a case to a settlement conference on its own initiative, on the request of a party, or upon stipulation of the parties. A settlement conference generally will be conducted by a magistrate judge, but in some limited circumstances may be conducted by a district judge. Upon written stipulation of all parties, the assigned judge, in the exercise of his or her discretion, may conduct a settlement conference.

7-3. Request of a Party.

At any time after an action has been commenced, pursuant to Civil L.R. 7-11(c), any party may file with the assigned judge, a request for a settlement conference. The parties may stipulate to a preference for one or more particular magistrate judges or district judges. The court will attempt to honor the preference, subject to intra-division needs and the availability of the magistrate judges and district judges.

7-4. Directives from the Settlement Judge.

Within any constraints fixed by the referring judge, the settlement judge shall notify the parties of the time and date of the settlement conference. The settlement judge shall also notify the parties of his or her requirements for pre-conference submissions and for attendance at the settlement conference. The settlement judge may order parties to attend. Unless the settlement judge otherwise specifies, "parties" are defined as follows:

ADR Local Rules

(a) Corporation or Other Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to settle and who is knowledgeable about the facts of the case.

(b) Government Entities. A party that is a government or governmental agency, in addition to counsel, shall send a representative knowledgeable about the facts of the case and the governmental unit's position, and who has, to the greatest extent feasible, authority to settle. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

7-5. Prohibition on Communication between the Settlement Judge and the Assigned Judge.

Except as is necessary to preserve the court's capacity to enforce lawful orders or discipline contumacious conduct, or unless all parties otherwise stipulate, the settlement judge may not disclose to the assigned judge any communications that occurred during the settlement conference, the settlement judge's views of the merits of the case, or any party's position with respect to settlement.

8. OTHER ADR PROCESSES

8-1. Other Court ADR Processes.

(a) Non-binding Summary Bench or Jury Trial. A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for protracted trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which the evidence may be presented in condensed form, usually by counsel and sometimes through witnesses. This procedure, as ordinarily structured, provides the litigants an opportunity to ask questions and hear the reactions of the judge or jury. The judge's or jury's nonbinding verdict and reactions to the legal and factual arguments are used as bases for subsequent settlement negotiations. Parties considering a non-binding summary trial are encouraged to contact the ADR Unit for assistance in structuring a summary trial tailored to their case.

(b) Special Masters. The court may appoint special masters to serve a wide variety of functions, including, but not limited to: discovery manager, factfinder or host of settlement negotiations. Generally the parties pay the master's fees.

8-2. Private ADR.

There are numerous private sector providers of ADR services including arbitration, mediation, fact-finding, neutral evaluation and private judging. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques. Virtually all private sector providers charge fees for their services.